No. 06-1902

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

RICHARD H. HATCH, JR.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE APPELLEE, UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

SENTENCING GUIDELINES

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether the district court precluded Hatch from testifying that the producers of the *Survivor* show promised to pay his taxes in the event he won the $1 million prize.

2. Whether the district court abused its discretion in limiting the cross-examination of three government witnesses.

3. Whether the district court abused its discretion in admitting or excluding alleged expert witness testimony.

4. Whether the perfunctory sentencing claims are waived and meritless.

II. STATEMENT OF THE CASE

A. Procedural History

On September 8, 2005, a District of Rhode Island grand jury returned an indictment charging Richard Hatch with related tax and fraud crimes. (Appendix at 15-43 (A:15-43).)

Count 1 alleged that Hatch filed a 2000 tax return in which he falsely stated that his income was negative $41,087 and that he was owed a $4,483 refund, and that he willfully failed to declare three sources of income: (a) over $1 million that he won on the nationally televised show *Survivor;* (b) $18,708 in rental income from a property he owned in Newport; and (c) $25,000 in charitable donations which he diverted to his own use (making it reportable personal income). (A:15-23.)

Count 2 alleged that Hatch filed a 2001 tax return in which he falsely stated that his income was $228,077 and that he was owed a $43,296 refund, and that he willfully failed to declare four sources of income: (a) roughly $320,000 that he received as co-host of a radio show; (b) $9,396 in rental income from the Newport property; (c) $27,074, representing the value of a car he won as part of his *Survivor* show prize; and (d) $11,500 in charitable donations which he diverted to his own use. (A:23-32.)

Count 3 alleged that Hatch filed a 2001 tax return for an S-corporation called Tri-Whale Enterprises, created to receive his radio show income, and that he falsely stated that Tri-Whale's annual income was $68,173, omitting the $320,000 discussed above. (A:33-34.)

Counts 4-9 alleged that Hatch defrauded four companies which contributed $36,500 in charitable donations (the same money that formed a partial basis of Counts 1 and 2), in violation of the mail and wire fraud statutes. Count 10 alleged that Hatch defrauded People's Credit Union when he altered a $25,000 donation check so that he appeared as a payee, and then deposited it in his account there. (A:34-43.)

Following a nine-day trial, a jury convicted Hatch on the tax counts but acquitted him of the remaining charges. On May 16, 2006, the district court (Torres, C.J.) sentenced him to a total of 51 months in prison, the high end of the guidelines range.

B. Offense Facts

1. The False 2000 Tax Return (Count 1)

For seven weeks in 2000, Hatch competed with sixteen other contestants on a reality television show called *Survivor*, filmed on the island of Pulau Tiga off the coast of Borneo. (1:78-83,89-90.) As the lone "survivor" of the contest Hatch was awarded a prize of $1 million and a car, and he also received $10,000 for appearing on the August 23, 2000 finale of the show, aired by CBS. (1:79-80,90-99; Exhibits 10-11, 16-17, 18-19.) The producer of the show, Survivor Entertainment Group ("SEG"), cut two checks to Hatch in these amounts. (1:77-78,91-99; Exhibits 10, 11.) Hatch deposited the $1 million check in his bank account. (2:61-62,70-71; 4:149; Exhibits 10, 261.) Hatch endorsed the $10,000 check over to a construction company that was renovating his residence in Middletown, Rhode Island. (5:36; Exhibit 11.)

Prior to the competition, Hatch signed a contract which stated in clear terms that he was not an employee or agent of SEG and that he would be responsible for all taxes associated with any winnings: "I shall pay all state and federal or other taxes on any prizes I win." (1:83-89,106-107; Exhibit 9.) Early in 2001, after Hatch received his prize, SEG sent Hatch a stark reminder to the same effect: an IRS 1099 form reporting that Hatch had received $1,010,000 in income from SEG in 2000. (1:99-100; Exhibit 12.)

Hatch's success on *Survivor* led to his December 7, 2000 appearance on the pilot episode of a television show called *For Goodness Sake!*, which spotlighted charitable causes of celebrities. (2:19-27,34-35; Exhibit 106B.) In return for that appearance, the show's producer, Chamber's Communications Corporation, covered Hatch's travel expenses and made a $25,000 donation to "Horizon Bound," a non-profit charity set up by Hatch and touted by him as an entity that would take disadvantaged teenagers on camping trips to build their self-esteem. (2:20-47,51-52,103-108; 3:53; 4:59; 5:35; Exhibits 96-103, 105, 106B.)

When Hatch received the $25,000 check payable to Horizon Bound, he tried to deposit it in his personal account at Newport Federal Savings Bank, but the bank refused because the check was payable to a corporation. (2:53-70; Exhibits 99, 104A-104C, 261.) Undeterred, Hatch altered the check so he would appear as a payee and deposited it in his personal account at People's Credit Union. (2:46-47,51,67-70,74-79; 4:164-166; 5:5-6; Exhibits 99, 100, 207-208, 238.) Hatch then spent the money on personal items such as gifts and a costly renovation of his Middletown residence. (2:101-102; 4:164-176; 5:11-13,28-34,42-53,59-68,130-136; Exhibits 181-196, 197A-197Z8, 209-227, 294-298, 300, 301, 309.)[1] None of the

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[1] Hatch promptly sold the renovated residence in August 2002. (2:103; 5:13; Exhibit 295.) The only significant sum that Hatch clearly spent on Horizon Bound was the $3,000 that it cost to incorporate the entity and apply for tax-exempt status. (5:13-15; Exhibits 314-315.)

money was applied to a charitable purpose, much less to the ostensible purpose of Horizon Bound. (Ibid.; 2:105-124.) It was all personal income and taxable as such. (5:83-85).[2]

Also in 2000, Hatch received $18,708 in rental income from the tenants of property he owned in Newport, often collecting the money himself. (1:152-170; 2:10-11,18,102; 5:6-10; Exhibits 56-57, 59-60, 61A, 64-65, 67-69, 78-79, 80-86, 88-95, 311.)

In March 2001 Hatch hired accountant Richard Plotkin to prepare his 2000 tax return. (3:79-83.) Hatch provided Plotkin with the 1099 reflecting his $1,010,000 in *Survivor* income, along with 1099s listing income from other sources (e.g., income from a book deal, Conde Nast, and Reebok). (3:88-90,94-99; Exhibits 12, 117-123.) Hatch also gave Plotkin a photocopy of his own detailed accounting of his income (distinguishing 1099 income from W-2 income), in which he noted the *Survivor* income but omitted the $25,000 "charity" income and the $18,708 rental income. (3:99-102; Exhibit 124.) Hatch wrote that his "Total Income" was "1,166,626.10." (Exhibit 124.) In a second handwritten summary, Hatch referred to the rental property but claimed (falsely) that it had generated "no rental income" in 2000 because it was "in

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[2] Hatch never told the unpaid "executive director" of Horizon Bound about the $25,000; indeed, as far as the director knew, Horizon Bound never received any donations at all. (2:116-118,158-159.) The director put a total of 50-60 hours into the Horizon Bound project (2:129-130), with no results (2:105-124; 3:64-65).

renovation." (3:105-106; Exhibit 125.)[3] In his discussions with Hatch, Plotkin made clear that the *Survivor* income had to be reported and Hatch expressed no doubt about that. (3:83-84,88.)

In November 2001 Plotkin reviewed with Hatch the 2000 tax return he had prepared, which included the *Survivor* income (but not the $25,000 "charity" income or the $18,708 rental income) and which stated that Hatch owed $374,831 in taxes and $66,670 in interest and penalties for late filing. (3:86,89-94,110-113; Exhibit 2.) Hatch did not question Plotkin's inclusion of the *Survivor* income. (3:111.) Indeed, Hatch and Plotkin discussed various IRS payment options and the possibility of a compromise. (3:111-112.) Plotkin and Hatch then signed the return. (3:112,132.) Plotkin offered to file the return but Hatch said he would do it himself. (3:112-113.) Hatch never did so.

Instead, in late fall of 2001, Hatch hired a self-employed accountant and family friend named Jodi Rodrigues Wallis to prepare his 2000 tax return from scratch. (3:148-152; 4:64,104; A:169.) Hatch provided Wallis with a 1999 return prepared by Plotkin, but not the 2000 return prepared by Plotkin. (3:158-159.) When Wallis asked for permission to contact Plotkin, Hatch refused. (3:147,

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[3] Hatch later said that he had received 60 days of rental income amounting to $4,000, and therefore Plotkin's assistant crossed out the "no rental income" and wrote "$4,000" underneath it (3:102-110; Exhibits 2, 125), but this was also false because he had received seven months of rental income totaling $18,708.

159-160; 4:96-97,142.)[4] Hatch also failed to provide Wallis with the 1099s reflecting his non-*Survivor*-related income for 2000 -- forms that he had given to Plotkin. (3:165-169.) Hatch said he had been so busy with the *Survivor* show that he had not had time to earn other income that year. (3:160-161,165.) Hatch claimed that his rental property earned no income because it was under renovation, and he denied that he had received any royalties from a book deal. (4:5-6,11-12.) Hatch assured Wallis that he had disclosed all sources of income for 2000. (3:160.)

Hatch did provide Wallis with the 1099 reflecting the *Survivor* income, as well the original handwritten accounting sheet he had given to Plotkin which stated that there was no rental income. (3:152-154; 4:6-9; Exhibit 134.) However, Hatch withheld the other handwritten summary of his 1099 and W-2 income. (3:169; Exhibit 124.) Hatch also told Wallis (falsely) that (a) in connection with his receipt of the *Survivor* prize he had paid 20% in commissions to an agent and a manager, (b) CBS had required him to retain an agent and manager in advance in order to claim the prize, and (c) the SEG contract had not contained any language warning that he would be responsible for paying taxes. (1:81-85; 3:157,169-170; 4:13-17; Exhibits 9, 124, 135.) Wallis informed Hatch that he was still

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[4] Plotkin recalled that a female accountant phoned his office asking for information about Hatch and that he told her he could not release any information without Hatch's permission. (3:140,147.) Wallis thought she may have made such a call before Hatch instructed her not to contact Plotkin. (4:96,142.)

required to pay taxes on the *Survivor* income, though he could deduct the purported commissions. (3:157-158; 4:13-17; Exhibit 135.)

On March 1, 2002, Wallis handed Hatch a fully prepared and signed 2000 tax return reflecting the *Survivor* winnings less deductions and omitting (a) the $25,000 "charity" income, (b) the $18,708 rental income, and (c) other 1099 income that Hatch had divulged to Plotkin but concealed from Wallis. (3:154,158,161-169; 4:8-9,12-13,17-19; Exhibits 2, 3.) This return stated that Hatch owed $234,807 in taxes. (4:12-13; Exhibit 3.) Hatch left Wallis's house with the return in hand as though he intended to file it with the IRS. (4:18-19.) Hatch never did so. (4:19-21; Exhibit 137.)

In July 2002 Hatch received a letter from the IRS notifying him that it had not received his 2000 tax return and listing the 1099 income that it was aware of. (4:19-21,75-77; Exhibit 137.) The notice omitted the *Survivor* income, but warned that the list might not be all-inclusive. (4:19-27,76; Exhibit 137.) Hatch gave the notice to Wallis. (4:20.) Wallis advised Hatch that he would need to file an amended tax return which included the 1099 income reflected on the notice (1099 income Hatch had not told her about earlier), and that he was still required to pay taxes on the *Survivor* income even though the notice had not mentioned that income. (4:19-27,35,71-73,77,83.) Hatch ignored that advice.

In the fall of 2002, Hatch asked Wallis what his 2000 tax exposure would be if the *Survivor* income were wholly excluded from the analysis. (4:27-30.) Wallis offered to prepare a spreadsheet with that analysis, but Hatch wanted the information in the form of a completed tax return. (4:28-29.) Wallis obliged. Wallis prepared a hypothetical 2000 tax return omitting the *Survivor* income and stating that Hatch's income was negative $41,087 and that he was owed a $4,483 refund. (1:145-147; 4:29-33; Exhibit 1.)

On November 19, 2002, Wallis handed Hatch the promised hypothetical 2000 tax return, which did not bear her name or signature. (4:32-33,90,99-101.) Both orally and in a clearly written letter that Hatch signed in Wallis's presence, Hatch agreed that the mock return was for informational purposes only and that he would not file it. (4:33-38,70-71; Exhibit 132; A:440.) Wallis said she could lose her license if he filed the return. (4:37.) Hatch said he understood. (4:37.) Later that day, however, Hatch mailed the return to the IRS. (1:145-147; 4:39-41; Exhibit 1.)

The return that Hatch filed omitted all three sources of income discussed earlier: the *Survivor* income; the "charity" money Hatch had converted to personal income; and the rental income. (1:145-147; 4:38; Exhibit 1.)

As a result, Hatch paid no taxes and in fact received a $4,483 refund. (4:152-153; Exhibit 251.) If Hatch had complied with the law he would have paid $375,652 in taxes. (5:79-109; Exhibit 313.)

2. The False 2001 Tax Returns (Counts 2 and 3)

Between January and December 2001, Hatch served as a co-host on Boston radio station WQSX-FM's morning show. (1:120-140.) In return, the station's operator, Entercom, Boston LLC, paid Hatch $70,232 for his January-March appearances and $321,139 for his April-December appearances. (1:120-121,125-140; Exhibits 22, 23, 25-40, 308.) The $70,232 was paid as W-2 income because Hatch was then an employee of the station. (1:127-130,135-137; Exhibits 22, 40.) At Hatch's request, Entercom paid the $321,139 to Tri-Whale Enterprises, an S-corporation created by Hatch. (1:130-135,137-142,150-152; 4:41-42,161-164; Exhibits 23, 25-39, 44, 45.)

An S-corporation is a flow-through corporation, meaning that profits or losses flow through to the shareholders, who bear the tax consequences. (3:116-117; 4:43,49-50; 5:22.) Hatch was the sole shareholder of Tri-Whale, and he was required to list any Tri-Whale income on his individual tax return. (1:150-152; 3:117; 4:41-43,164; 5:22; Exhibit 45.) Hatch also was required to report that income on his Tri-Whale tax return. (4:42-43; 5:22,91.)

Hatch deposited the Entercom checks payable to Tri-Whale in a Tri-Whale bank account. Hatch then transferred most of the funds to his own account at the same bank. (4:150-161; Exhibits 254-260, 263, 265, 267-269, 273, 277, 280-281, 287, 289, 308.)

In February 2001 Hatch claimed the final part of his *Survivor* prize: a car valued at $27,074. (1:80-81,93,108-118; 3:50; 5:90-

91; Exhibits 46, 51-53.) General Motors sent Hatch a 1099 reflecting his receipt of $27,074 in income. (1:119; Exhibit 54.)

On April 14, 2001, Hatch appeared as a contestant on a NBC television show called *The Weakest Link*. (3:8-14,21.) In return, the show's producer, Weakest Link Productions, paid Hatch a small fee and made a $10,000 donation to Horizon Bound. (3:11-29,34,42-44; Exhibits 112, 244.) Before the $10,000 check was issued to Horizon Bound, Hatch faxed an NBC representative two documents regarding Horizon Bound's tax-exempt charitable status, both of which bore the forged signature of Ralph Magee, a friend of Hatch's who was unaware that Hatch was holding him out as Treasurer of Horizon Bound. (3:21-28,35-42,48-65; Exhibits 98, 113, 114.) When Hatch received the $10,000 check payable to Horizon Bound he deposited it in a Horizon Bound bank account. (3:28-29; 4:176-179; Exhibits 243-244, 249.) A month later, however, Hatch wrote a $10,000 check on that account to a construction company that was renovating his Middletown residence. (4:179-180; 5:63-67,136; Exhibits 196, 246.) None of the money was spent on a charitable purpose. (2:105-124; 4:179-184; Exhibits 247-248, 310.) It was all personal income and taxable as such. (5:90.)

On April 17, 2001, Hatch spoke about his *Survivor* experience and Horizon Bound at East Boston Savings Bank. (2:82-83,85-90,92-93,95,99.) Thereafter, the bank wrote Horizon Bound a check for $1,000, which Hatch deposited in the Horizon Bound account. (2:90-

91,93,97-98; 4:177-178; Exhibits 109, 240.) CAM Media and Graphics, which arranged for Hatch to make his presentation, wrote a $500 check to Horizon Bound. (2:80-85; Exhibit 108.) Hatch deposited this check in his personal account at People's Credit Union. (Exhibit 108.) None of the $1,500 was devoted to a charitable purpose. (2:105-124; 4:179-184; Exhibits 247-248, 310.) It was all personal income and taxable as such. (5:90.)[5]

Also in 2001, Hatch received $9,047 in rental income from the Newport property. (1:170-178; 2:18; 5:10-11; Exhibits 62-63, 71-72, 74-77, 312.)

In preparing Hatch's 2001 individual tax return and the 2001 S-corporation tax return for Tri-Whale, Wallis made clear to Hatch that he was individually liable for any income of Tri-Whale and that such income also needed to be reported on the S-corporation return. (4:41-43.)[6]

Hatch told Wallis about the January-March wage income from Entercom of $70,232, but failed to disclose the April-December payments of $321,139 that Entercom made to Tri-Whale -- the largest source of income that Hatch had received that year. (4:44-49,52-

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[5] As before, Hatch did not discuss the contributions with the unpaid director of Horizon Bound, who thought that Horizon Bound had never received any contributions from any source. (2:117-118,158-159.)

[6] In an earlier conversation with Plotkin, Plotkin had given Hatch a similar explanation concerning the tax consequences of S-corporations. (3:113-117,125.)

53,135; Exhibit 142.) When Wallis asked Hatch whether he had opened a bank account for Tri-Whale, suggesting she might want to look at the bank statements, Hatch told her (falsely) that he had not done so. (4:44,136-137.)

Hatch also failed to tell Wallis about the income from (a) the car, (b) the rental property, and (c) the diverted donations. (4:53-63.) When Wallis inquired about the car (which she knew he had won), Hatch lied and said he had not yet received it. (4:53-55.) As before, Hatch told Wallis that the rental property had earned no income because it was still being renovated. (4:57-58.)[7]

Accordingly, Wallis prepared a 2001 individual tax return for Hatch which omitted all four sources of income (totaling $374,510) and which falsely stated that his income was $228,077 and that he was owed a substantial refund. (1:148; 4:41-42,50-63; Exhibit 5.) Likewise, Wallis prepared a 2001 S-Corporation tax return for Tri-Whale which omitted the $321,139 in Entercom payments and which falsely stated that Tri-Whale had received only $68,173 in income. (1:148-150; 4:41-44; Exhibit 7.) Hatch filed the Tri-Whale return on October 1, 2002 and the individual return on October 9, 2002. (4:50-51; Exhibits 5, 7.)

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[7] Earlier, Hatch had suggested to one of his tenants that if he kept the utilities in his own name (as in fact he did, 1:155,160-161,175; 2:10-11,15-16), it would make the property look like his residence instead of a rental property and he could avoid paying taxes (2:10-12,16-17).

As a result, Hatch paid no taxes and received a $44,874 refund. (4:153; Exhibit 252.) If Hatch had complied with the law he would have paid $99,319 in taxes. (5:79-109; Exhibit 313.)

3. The Defense Case

Hatch called the contractor who renovated his Middletown residence, apparently to suggest that the project had something to do with Horizon Bound. (5:128-136.)

Hatch called his manager to suggest that at the time he filed the returns he was distraught over an allegation that he had abused his adopted son. (5:137-152.) The manager, however, testified that the child abuse charge was dismissed in the summer of 2000, more than two years before the tax filings. (5:157-158.) He also stated that commissions paid by Hatch had postdated the *Survivor* prize and had nothing to do with it. (5:153-157.)

The attorney Hatch hired in connection with the child abuse charge confirmed that the charge was dismissed in 2000, but noted that Hatch had filed two related civil lawsuits that lasted into the period when he filed the tax returns. (5:158-171.)

A high school teacher testified that (1) he ran a real camping program called Horizon Bound in the 1970s and 1980s, (2) Hatch was a camper in the summer of 1979, and (3) he gave Hatch permission to incorporate a new entity under the same name after Hatch won *Survivor*, but he was unaware Hatch was holding him out as Secretary of the new Horizon Bound. (5:171-183.)

Hatch himself testified concerning (1) his camping experience and his desire to start a new Horizon Bound, (2) the child abuse charge, (3) the *Survivor* contest and certain alleged expenses he had incurred as a result, (4) his purported misunderstandings about the tax implications of the *Survivor* prize (e.g., his theory that perhaps CBS or SEG paid the taxes for him), (5) alleged stresses he was under when he filed the returns, and (6) expenses he said were related to Horizon Bound. (6:4-141.)

More specifically, Hatch (1) claimed that Wallis knew full well that he was going to file the hypothetical tax return omitting the *Survivor* income, and that she had him sign Exhibit 132 so she could distance herself from what was happening -- a claim that constituted further proof of his own guilty mind (6:116,122), (2) conceded that the commissions he had paid to his manager, agent and attorney had nothing to do with the *Survivor* prize (6:124-127), and (3) asserted that the "mistakes" on his tax returns were made in good faith and that he had intended to file amended returns correcting the mistakes (6:126-133,138-141).

On cross-examination, Hatch admitted that (1) he had received many 1099s over the years and had reported the income stated on those forms (6:146-147), (2) he received 1099s reflecting the *Survivor* cash and car (6:155), (3) three months after *Survivor* he authored a book in which he acknowledged he would have to pay taxes on the prize (6:153-154), (4) he initially set aside $350,000 with

the expectation of using some of it to pay taxes (6:157-158), (5) Plotkin told him that it was clear he had to pay taxes on the prize (6:173), (6) he failed to report roughly $320,000 in Tri-Whale income (7:54-56,98-99); (7) he deposited the $25,000 donation in his personal account and used the money for personal expenses because he felt Horizon Bound owed him money (7:59-66,74,78); and (8) he used the other $11,500 in donations in similar fashion and under similar logic (7:87-98).

Finally, Hatch called an accountant in an apparent attempt to show that there were certain unrelated defects in the tax returns prepared by Plotkin and Wallis -- testimony that the court found was largely irrelevant. (7:129-156,160-165.)

4. Rebuttal

The government called two witnesses to rebut Hatch's testimony that someone at People's Credit Union added his name as a payee to the $25,000 donation check. (7:178-189.)

III. SUMMARY OF ARGUMENT

1. The district court never precluded Hatch from testifying that SEG promised to pay his taxes in the event he won the $1 million prize. In fact, the court invited such testimony several times. After a cat-and-mouse series of proffers, defense counsel ultimately chose not to ask Hatch the key questions. Any wound was self-inflicted. Moreover, even if the court's ruling is viewed as imposing limits on the order of proof, the result is the same. Any error was harmless in any event.

2. The record refutes Hatch's claim that the court placed broad restrictions on his cross-examination of three witnesses. Hatch's record citations reveal that the court blocked isolated questions, generally because they were irrelevant, confusing, and argumentative. Hatch's new allegation of government misconduct is unfounded. Any error was harmless in any event.

3. Hatch appears to argue that four government witnesses were allowed to testify as experts in violation of Rule 702. The issues here are largely unpreserved. Three of the four witnesses plainly did not give expert testimony. Even if the fourth did so, that testimony complied with Rule 702 in every respect. Moreover, the court properly limited the examination of an alleged expert called by the defense. Any error was harmless in any event.

4. The perfunctory attack on the within-guidelines sentence is waived. It is also factually and legally unsupported.

IV. ARGUMENT

A. THE COURT NEVER PRECLUDED HATCH FROM TESTIFYING THAT SEG AGREED TO PAY HIS TAXES

1. Introduction

Hatch claims the district court prevented him from testifying that during the *Survivor* contest, the show's producer, Mark Burnett of SEG, promised Hatch that SEG would pay his taxes if he were to win the $1 million prize -- a promise Burnett allegedly made after Hatch caught SEG helping other contestants cheat by giving them food. (Br. 2, 15, 16-29.)

To quote Hatch: (1) "the district court refused to allow [his] testimony about the consideration for the deal Burnett proposed, that if Hatch won the show, his taxes would be paid" (Br. 16); (2) the alleged "encounter with the show's producer . . . was excluded from evidence" (Br. 2); (3) the court would not allow him to testify that the "show's producers . . . agreed that if he won, they would pay his taxes" (Br. 15); (4) the court "shut down" his proposed defense based on "Burnett's proposed deal" (Br. 16); (5) the court barred him from describing "the quid pro quo arrangement offered by Burnett when Hatch caught the show's producers cheating" (Br. 22); (6) the court "decided the jury would not hear" about "the agreement with Burnett" (Br. 24); and (7) the court precluded him from testifying that "Burnett told him CBS/SEG would pay his taxes if he did not blow the whistle on the network" (Br. 25).

This Court reviews rulings excluding evidence for an abuse of discretion. United States v. Maldonado-Garcia, 446 F.3d 227, 231-32 (1st Cir. 2006). As now explained, there was no such abuse here for a simple reason: contrary to Hatch's claims, the district court told his counsel several times that he could present evidence that the *Survivor* producers promised to pay his taxes. (6:32-33,48-49.) What the court was unwilling to tolerate was a side-show concerning whether the producers helped other contestants cheat, divorced from the key defense predicate: that this had all led to the alleged promise. In the end, defense counsel chose not to ask Hatch whether Burnett or someone else at SEG had made such a promise. Counsel's failure cannot be transformed into an abuse of discretion by the court.

2. Defense Counsel Dances Around the Alleged Promise

The issue raised on appeal was not the subject of any pretrial filing or motion in limine. It was only briefly alluded to in the defense opening statement, which contained the following vague remark: "There was a lot of discussion on the show as to whether or not the show would cover the taxes." (1:64.) Aside from that isolated sentence, there was no hint that Hatch would defend the case on the basis that Burnett or SEG had promised to pay his taxes. (1:53-77.) Defense counsel did say that SEG had run a "disorganized" contest and had portrayed Hatch in a false light, but these comments were not linked to any tax promise. (1:65,75.)

The man who purportedly brokered the tax-free deal with Hatch, Burnett, testified as the government's first witness. (1:77-101.) Defense counsel never asked Burnett whether he or others at SEG had promised that SEG would pay Hatch's taxes. (1:101-105.) Moreover, there was no suggestion that Hatch told Plotkin or Wallis about a promise from Burnett when Hatch had them prepare the two tax returns which listed the $1 million *Survivor* prize as income -- the returns he never filed.

During direct examination of defense witness Alan David, counsel returned to the theme raised in his opening: that SEG had portrayed Hatch in a negative light (as a "schemer") in the way it edited footage from the show. (5:139-144.)

During direct examination of Hatch, counsel continued in the same vein, attempting to establish that SEG had staged some aspects of the show, such as Hatch's encounter with a shark. (6:27-30.) When the court at sidebar asked counsel how that was relevant, he responded: "It shows there's staging. He caught the shark, they made him release it and catch it again, and that time it bit him." (6:30.) When the court asked again how that was relevant, counsel replied: "Because a great deal of this has been staged to make him appear to be evil and that sort of thing." (6:30.)[8] Apparently referring to the prior day's testimony of Alan David, the court

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[8] The footage of the actual show was never introduced in evidence.

indicated that the general theme that Hatch seemed to be pressing had no relevance to the tax or fraud charges. (6:30.)

Faced with that ruling, counsel shifted gears and edged closer to the issue now raised on appeal. While still at sidebar, counsel stated obscurely that his "next area of questioning" was that "part of the reason that there was miscommunication on the million dollars was that there were problems with the show, things that people were not doing, and that led them to ask questions about the way this was going to be done." (6:30-31.) The court replied: "I don't think the manner in which the show was filmed has anything to do with that, so let's move on." (6:31.) Counsel then clarified that he wanted to show that the contest rules were changed in midstream. (6:31.) When the court asked whether he was referring to the rules concerning how Hatch would be paid, counsel stated: "Well, it's a continuing course of conduct, the rules are not changed just for the payment. They also were changed during the contest." (6:31.) Clearly frustrated by counsel's lack of clarity, the court said that it would have to rule on objections as they were made but that counsel needed to "move off of the details or the manner in which the show was filmed." (6:31.)

This prompted counsel to inquire again whether he could ask Hatch about "the rule change on the show?" (6:31.) The court responded: "The rules [on] how he would be paid?" (6:31.) Apparently still unwilling to commit himself to the position that

Hatch would testify that Burnett or SEG promised to pay his taxes, counsel replied cryptically: "No, that led right up to that, that led him to believe that the rules were continuing to change that created an ambiguity in how he was going to be paid." (6:31-32.) The court then cut to the chase: "If it has anything to do with the terms of his payment and who was going to pay taxes on the money he won, you can certainly get into it. Let's get back to it." (6:32) (emphasis added).

The underscored statement was counsel's green light to ask the question "did anyone at SEG or CBS ever promise to pay your taxes?" Instead of proceeding through that intersection, however, counsel asked: "Rich, did there come a time when you realized that the production was not going to completely go by the rules as they had been described to you?" (6:32.) When the government objected, the court asked: "The rules of what, Mr. Minns? . . . [t]he rules as to how the competition was conducted or how Mr. Hatch would be paid if he won anything?" (6:32.) Counsel replied: "Well, first, that, which leads into the second, your Honor." (6:32.) No doubt concerned that there would never be any "second," the court responded: "Well, let's talk about the second. To the extent you're asking about the first, the objection is sustained." (6:32.) The court added: "You can certainly get into anything that Mr. Hatch has to say on the rules of how he was to be compensated if he won." (6:32-33) (emphasis added).

Here again, the court invited counsel to ask whether the producers had promised Hatch that SEG would pay his taxes. Instead of asking that question, counsel switched gears and asked Hatch whether he had had discussions with other contestants concerning their plans to pay taxes on any winnings. (6:33-34.) When that questioning proved unfruitful, counsel finally got closer to the point: "The *Survivor* show, was there a time when you met with anybody on the show and had discussions which began to convince you that the show might pay the taxes for you?" (6:34.) This time it was Hatch himself who was opaque:

> Yes. Not contestants. I met with the producers when, for all intents and purposes, we probably shouldn't have been meeting with the producers, but the show almost stopped filming as a result of a number of things that took place, and Mark Burnett, who testified here, and the other executive producer, Craig Pelligian, came in and spent a significant amount of time with the final four who were remaining. And I personally had many discussions with both and each of them.

(6:34.) This was a natural point for counsel to ask Hatch whether any of these "discussions" had pertained to taxes, and what Burnett and Pelligian had said on that topic. Instead of asking those questions, counsel inquired whether he could make a further proffer. (6:34.) The court said he could do so at the morning recess. (6:34.)

At the morning recess counsel went a bit further, but was still coy:

> For the record, were we permitted to do so, I would elicit testimony that during the show there were rules, but they were constantly being changed, and that one of the rules were [sic] no outside attention, and that people with the program who did not want Richard Hatch to win, began to try to manipulate it for him to lose, and they started smuggling food to some of the competing contestants. This led to an encounter with Mr. Hatch and Mr. -- I believe the gentleman who was on the stand, Mr. Burnett, I don't -- it led to some interviews with different people on the show in which Mr. Hatch was complaining about this. And during those moments, they apologized to him. And from the conversations and gatherings, Mr. Hatch left with the understanding that if he won the show, the studio would pay his taxes. And this was a result of them breaking the rules and actually breaking the law with trying to manipulate the results of the contest.

(6:48.) In this carefully worded passage, defense counsel all but conceded that Hatch would not in fact testify that Burnett or someone else at SEG promised that SEG would pay his taxes; at best, Hatch would testify at length concerning various alleged "rule" violations and alleged SEG apologies, and he would then suggest to the jury that this experience had somehow led to his "understanding" that SEG would pay his taxes.[9]

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[9] The implication that there was no such promise is made even clearer by the fact that (1) counsel never asked Burnett, the alleged promisor, about the subject, (2) Hatch apparently never mentioned the promise to either of his two accountants, and (3) Hatch only told Wallis about a hazy theory that maybe CBS or a third party covered his taxes, not about an express deal struck with Burnett. (Supra:3-16; 3:155-157; 4:25-26; 6:110; 7:36-37.)

The district court expressed doubts about the proffer: "Well, you kind of lost me on the connection. I think I indicated that if you had evidence that Mr. Hatch wanted to present evidence that the individuals who were running the show had told him something or led him to believe that they would be paying the taxes on any earnings, you can certainly do that." (6:48-49) (emphasis added). The court noted that the "details of how the show was being staged" were not in themselves relevant to Hatch's state of mind when he filed his tax returns almost two years later (6:49), but it once again allowed counsel to pursue the main point: "Now, as I say, if there is evidence as to what the persons running the *Survivor* show and responsible for compensating him may have told him about the taxability of his prize money or who would pay the taxes on the prize money, that's a different matter. I thought I made that clear, that you could go into that." (6:49) (emphasis added).

Faced with yet another opportunity to ask the key questions of Hatch, counsel again demurred, stating without elaboration that the issue would not make "any sense whatsoever" unless it was first put in "context." (6:49.)

3. There Was No Abuse of Discretion

As stated above (supra:18), on appeal, Hatch makes numerous assertions to the effect that the district court precluded him from testifying about an alleged incident in which Burnett promised that SEG would pay his taxes. As the underscored passages quoted above

make plain, however, the district court affirmatively invited him to present such testimony several times. (Supra:22,25.) Even worse, the record suggests that Hatch was unprepared to so testify and that counsel's true aim was merely to create side issues concerning alleged contest violations. (Supra:19-25.) Because Hatch's argument turns entirely on a false premise, the Court may reject it on that basis alone.

Hatch relies heavily on Cheek v. United States, 498 U.S. 192 (1991), and Cheek-based decisions. (Br. 18-26.) It is true that in light of Cheek, a defendant may introduce evidence that he had a subjective belief that he had no legal duty to pay taxes, even if that belief is objectively unreasonable. United States v. Bonneau, 970 F.2d 929, 931-34 (1st Cir. 1992); United States v. Lussier, 929 F.2d 25, 31 (1st Cir. 1991). This is because ignorance of the law is a defense in a tax case. United States v. Lachman, 387 F.3d 42, 60 (1st Cir. 2004); United States v. Smith, 278 F.3d 33, 37-38 (1st Cir. 2002); United States v. Jordan, 112 F.3d 14, 17 (1st Cir. 1997). Having said that, it is unclear whether the Cheek rationale extends to purported mistakes of fact (e.g., "I thought someone else paid my taxes for me"). Whether under the logic of Cheek or a more general relevance theory, however, the district court correctly permitted Hatch to testify about any tax-related promises made by the *Survivor* producers; that testimony could not be excluded simply because it was likely perjurious. United States v.

Pittman, 82 F.3d 152, 154-55 (7th Cir. 1996) (Posner, C.J.). The problem for Hatch is that when the court specifically allowed such testimony, his counsel backed down. (Supra:22-25.) The wound, if any, was self-inflicted. Thus, even if Cheek applies here, the Cheek-based cases cited by Hatch, e.g., United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992), United States v. Powell, 955 F.2d 1206 (9th Cir. 1991), are of no help to him.

It is important to emphasize what Hatch does not contend. Hatch does not claim that the alleged cheating, staging, or changes in the contest rules were relevant in themselves, absent a link to the purported tax promise. Had Hatch pressed such a claim below, the court would have been well within its rights in excluding the evidence. See Fed. R. Evid. 401-403; Bonneau, 970 F.3d at 932-33 (rejecting claim that Cheek required admission of certain evidence in absence of a clear proffer, and noting that even where Cheek evidence is concerned "trial judges have ample latitude under Fed. R. Evid. 403 to weigh the importance of the evidence against the risk of jury confusion"); United States v. Willie, 941 F.2d 1384, 1391 (10th Cir. 1991) (Cheek evidence properly excluded given "inadequate offer of proof" and because it would have confused jury); Lussier, 929 F.2d at 31 (exhibits properly excluded despite Cheek where they "lacked a foundation of evidence or offer of proof to link them to the willfulness issue" and they "could only have confused the jury"). Indeed, the court suggested such evidentiary

concerns during the initial proffers made by defense counsel, when counsel failed to articulate any link between SEG's conduct during the contest and the tax issues. (6:30-33.)

Hatch also refrains from making an order-of-proof claim. Since that claim may appear for the first time in his reply brief, the government addresses it now.

One interpretation of the court's ruling is that in light of the series of vague defense proffers, it suspected counsel was more interested in the context for the alleged tax promise (the alleged cheating, staging and rule changes) than in the promise itself, and that it required counsel to address the promise evidence first to ensure that the link was made clear at the outset. (Supra:19-25.) Counsel himself saw the ruling in that light when he complained that he could not ask Hatch about the alleged promise without first building up the context. (Supra:25.) In other words, the battle between counsel and the court may be seen as one over the order of proof. It is settled, however, that courts have wide discretion in order-of-proof matters,[10] and here there were definite signs that the evidence would turn out to be all context and no promise. The fact that counsel was unwilling to elicit the promise first and the context later is not a basis for finding an abuse of discretion.

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[10] See Fed. R. Evid. 103(b), 104(b), 611(a); Santos v. Posadas De Puerto Rico Assoc., 452 F.3d 59, 62 (1st Cir. 2006); Morales Feliciano v. Rullan, 378 F.3d 42, 57 (1st Cir. 2004); United States v. Holmquist, 36 F.3d 154, 163 (1st Cir. 1994); United States v. Hudson, 970 F.2d 948, 956 n.2 (1st Cir. 1992).

Hatch has eschewed these more nuanced claims in favor of a bolder one: that the court outright precluded him from saying anything about the alleged promise. Because the record undermines that claim, the Court's inquiry can end there.

4. Any Error Was Harmless

For three main reasons, any error was plainly harmless in any event:

First, in light of the cryptic nature of Hatch's proffers (supra:20-25), it is not even clear what his testimony would have been. Counsel never stated that Burnett or someone else at SEG promised Hatch that SEG would pay his taxes. The concrete proffers now made on appeal, to the effect that there was an express deal with Burnett that if Hatch kept mum about the cheating SEG would pay his taxes (supra:18), bear no resemblance to the anemic proffers made below. In his most lucid statement, counsel merely alluded to an unarticulated "understanding" that Hatch developed in the wake of the alleged cheating and SEG apologies. (Supra:24.) It is highly unlikely that the jury would have given any weight to such amorphous testimony. Indeed, the testimony may have helped to convict Hatch. See, e.g., Pittman, 82 F.3d at 155 (concluding that excluded Cheek evidence would not have affected result because "[i]t is far from clear that there is any factual basis for the assertion that the defendants honestly believed they owed no taxes; and it is extraordinarily unlikely that a jury would have credited

this fantastic theory had it been presented to them"). At the very least, having failed to articulate below the proffers he now makes on appeal, Hatch may not receive the benefit of those proffers in the context of harmless error review.

Second, the evidence on Count 1 was not merely overwhelming; it was airtight. Hatch received unequivocal notice from no fewer than four separate sources that he was required to pay taxes on the $1 million prize: the SEG contract that he signed; the 1099 that SEG sent him and that he acknowledged receiving; and the advice of two separate accountants, Plotkin and Wallis, both of whom prepared tax returns which included the prize as taxable income. (Supra:3-8.) Indeed, Hatch himself told Plotkin that his total income for the year was "1,166,626.10," and he admitted in a book he authored that he would have to pay taxes on the prize. (Supra:5,15.) Any conceivable doubt concerning whether Hatch acted willfully was erased by the fact that Hatch (1) failed to report two other sources of income for that year (the "charity" and rental income), (2) made numerous false statements to both accountants, and (3) had Wallis prepare the hypothetical return omitting the $1 million prize -- a return that he promptly filed after promising Wallis he would not do so. (Supra:5-10.)

And third, Hatch's proffered evidence had little or no bearing on Counts 2 and 3, which charged wholly separate tax crimes based on different unreported income.

B. THE COURT IMPOSED APPROPRIATE LIMITS ON CROSS-EXAMINATION

1. Introduction

Hatch contends that the district court unfairly limited his cross-examination of witnesses Wallis, Plotkin and Agent Rameaka. (Br. 29-52.) Many of his claims are difficult to follow. Most are based on misinterpretations of the record. None has merit. Review is for an abuse of discretion. United States v. Coplin, 463 F.3d 96, 103 (1st Cir. 2006).

2. Cross-examination of Wallis on Exhibit 3

Hatch complains that the court unfairly restricted his cross-examination of Wallis on Exhibit 3. (Br. 30-31, 36-42.)

Exhibit 3 was the 2000 tax return prepared by Wallis which contained the *Survivor* income but which omitted the charity income, the rental income, and other sources of income. (Supra:6-8.) Hatch never filed that return. Instead, eight months later, Hatch filed the hypothetical 2000 tax return that Wallis prepared at his request -- a return that deliberately omitted the *Survivor* income and that Wallis instructed him not to file. (Supra:9-10.)

The lead premise of Hatch's argument is that the government introduced Exhibit 3 in an attempt to show that it was "accurate." (Br. 36.) The purpose of the exhibit, however, was to show that Hatch (1) had notice that he was required to report the $1 million in income, (2) concealed other omitted income from Wallis, and (3) falsely told Wallis that he paid roughly $200,000 in commissions to

receive the prize. The exhibit was not admitted for the accuracy of the data contained in it; far from it.

Buried in a discussion of seemingly unrelated issues, Hatch identifies two concrete places in the record where he says the court restricted his cross-examination of Wallis concerning Exhibit 3: Volume 4, pages 122 and 129. (Br. 31, 36, 38.)

On pages 122-123, the court sustained objections when counsel asked how many amended tax returns Wallis had prepared that year and during her entire career. (4:122-123.) Hatch never explained why that was relevant, and he does not do so now on appeal. (Br. 38.) Moreover, it is unclear what this has to do with Exhibit 3, which was not an amended return.

On page 129, the court sustained an objection to a question concerning the impact of the "alternative minimum tax" on Hatch's claimed deductions for the alleged $200,000 in commissions. (4:128-129.) Hatch fails to address the court's ruling, which was that: "You are confusing the jury. You're mixing up a lot of things and misleading the jury." (4:129.) Moreover, he also fails to note that the court invited him to pursue the alternative minimum tax issue and related issues (such as alleged deductions he might have taken) in his own case if he could show they were relevant. (4:129-130.)

Hatch also says that the court prevented him from inquiring into Wallis's "accounting practice." (Br. 38.) It is unclear what

he means and he offers no record citations. Perhaps he is referring to the point at trial where his counsel asked Wallis "[w]hy didn't you recommend to [Hatch] that he use your bookkeeping services, or somebody else's?" (4:118) (emphasis added). This irrelevant question capped a series of irrelevant questions, and it prompted the court sua sponte to call a sidebar at which it explained why counsel was veering off course. (4:118-119.) Moreover, contrary to Hatch's assertions (Br. 38), counsel never gave a coherent explanation concerning how Wallis's "expertise" in bookkeeping was relevant to the key disputed issue: whether Hatch willfully failed to report over $1 million in income that was omitted from the hypothetical tax return that he ultimately filed, Exhibit 1. Hatch never retained Wallis as a bookkeeper.

Under the heading of this argument, Hatch makes two further assertions. Hatch refers to the point in time when, months after Wallis prepared the Exhibit 3 tax return, Hatch returned to her and asked her for the hypothetical return omitting the $1 million prize, Exhibit 1. (4:19-41.) He then notes that on cross-examination, Wallis said she encouraged Hatch to file Exhibit 3 (to avoid further penalties) and to follow up with an amended return to reflect further income that Hatch had failed to report to her originally -- testimony Hatch interprets as an admission by Wallis that she advised him to file a false tax return. (Br. 37-38.) Putting aside the fact that Hatch has stripped the evidence of its

proper context (4:19-41,139-140), the claim does not advance his argument that the court restricted his cross-examination concerning Exhibit 3. If anything, it proves the contrary.

Hatch's second assertion is irresponsible. Referring to Exhibits 124, 135 and 135A (described supra:5-8), he suggests for the first time that the government or Wallis intentionally doctored Exhibit 135A -- the original from which the Exhibit 135 photocopy was made -- in an attempt to falsely implicate him, and that the government "concealed" what he calls the "log" of the exhibits. (Br. 39-43.) These are serious allegations for which there is no record support; they should have been presented to the district court in the first instance. In any event, Hatch makes no effort to link the accusations to his broader argument that the court unduly restricted his cross-examination of Wallis on Exhibit 3, and there is no apparent relationship between the two subjects.

The government briefly notes what the record does reflect. Exhibit 135 was admitted without objection. (4:14-15.) On cross-examination, Wallis testified that Hatch gave her the square piece of paper in the lower left-hand corner (A:443) and that she then stapled it to the larger document. (4:107-108.) That square piece of paper is identical to a portion of Exhibit 124. (A:437.) Consistent with Wallis's testimony, Hatch appeared to concede that he gave the square piece of paper to Wallis. (6:124-126.) His only claim was that Wallis had made an honest mistake in

interpreting the numbers written on it as commissions for the *Survivor* prize. (6:126-127.)[11] In reviewing Exhibit 124 on cross-examination, however, Hatch suggested Wallis herself had "ripped" off part of Exhibit 124 and placed it on Exhibit 135. (6:178-179.) He later went further and claimed (incorrectly) that Wallis had admitted during her testimony that she had "ripped" it off. (6:181; 7:23-24,26.) On redirect, Hatch and his counsel persisted in mischaracterizing Wallis's testimony on this point. (7:100-103.) To clarify matters, the government moved the admission of the original document, Exhibit 135A, on recross, ultimately without objection. (7:152-160.) Wallis's attorney had originally provided the government with the photocopy (Exhibit 135), and the government only received the original (Exhibit 135A) from the attorney that very day. (7:171-175.)

3. Cross-examination of Wallis on Exhibit 1

Hatch begins this argument with an inaccurate portrayal of the events surrounding Wallis's preparation of the hypothetical tax return omitting the *Survivor* income, Exhibit 1. (Br. 42.) The record facts concerning Exhibit 1 have been discussed. (Supra:9-10.) Hatch then refers to a portion of the cross-examination on this subject, but never identifies any restriction placed on it. (Br. 42-43.) There is nothing to respond to here.

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[11] Wallis had earlier testified that Hatch himself had expressly told her that he did pay such commissions on the *Survivor* prize. (3:169-170; 4:13-17.)

4. Cross-examination of Wallis on Exhibits 5 and 7

Hatch says the court unfairly restricted cross-examination of Wallis on Exhibits 5 and 7. (Br. 43-46.)

Exhibit 7 was the 2001 S-corporation tax return which falsely stated that Tri-Whale Enterprises received only $68,173 in income, omitting $321,139 that Entercom paid to Tri-Whale for Hatch's April-December appearances as a radio host. (Supra:10-14.) This formed the basis of Count 3. (A:33-34.) Hatch was required to, but did not, report the same $321,139 on his personal 2001 tax return, Exhibit 5. (Supra:10-14.) This formed part of the basis for Count 2. (A:23-32.) Wallis had made clear to Hatch that he was required to report all Tri-Whale income on both returns, but Hatch concealed the $321,139 from her and even denied that he had created a bank account for Tri-Whale. (Supra:10-14.) Not only had Hatch opened an account for Tri-Whale, but he had transferred most of the Entercom payments in that account to his personal account. (Supra:10-11,13.)

Wallis, Plotkin, and IRS Agent Jason Rameaka testified that in the case of S-corporations, profits or losses flow through to the shareholders, who bear the tax consequences. (3:116-117; 4:43,49-50; 5:22.) Hatch now says that Wallis's testimony on this point was "absurd" and that he was "not allowed to challenge" it on cross-examination, pointing to Volume 4, page 137. (Br. 44.) The sole blocked question, however, was: "The S corporation, it must

pay a reasonable salary to its employees, must it not; isn't that legally required?" (4:137.) Hatch overstates the record and never attempts to defend the quoted question.

Hatch maintains that his attempt to cross-examine Wallis on the "alternative minimum tax" (4:128-129) concerned Exhibits 5 and 7. (Br. 44-45.) It did not. It concerned Exhibit 3. (4:128.) Moreover, the government has already responded to the Exhibit 3-based claim. (Supra:31-33.)

Without pointing to further record citations, Hatch says that he sought to show that the S-corporation return was "incorrect," that Wallis was not "qualified" to prepare it, and that indeed she was "grossly negligent." (Br. 45-46.) Hatch never spells out what was wrong with the return. Still less does Hatch explain how the alleged imperfections -- whatever they are -- bear on the questions of whether he (1) deliberately concealed the $321,139 from Wallis, and (2) subsequently filed the return knowing it was false.

As the court made clear elsewhere, unless the unrelated imperfections could have had an impact on Hatch's intent, the fact that the returns prepared by Plotkin and Wallis may not have been "letter perfect" or "absolutely correct in every single respect" was irrelevant. (4:129-131.) Indeed, when the court made the same basic point at a pre-trial hearing, defense counsel conceded that the question of whether the tax returns were incorrect in other areas "may not go directly to the issue of willfulness in that

sense, your Honor." (12/21/05 Hearing 36.)[12]

Finally, the contested rulings did not prevent Hatch from developing his theory that he was "a poor bookkeeper under enormous personal stress." (Br. 46.)

5. Cross-examination of Wallis on Expertise and Bias

Hatch says that the court erred in sustaining objections to four questions. (Br. 46-48.)

First question. Hatch repeats his assertion that he tried to ask Wallis about her "accounting expertise," citing Volume 4, pages 118-119. (Br. 46.) As stated, however, the actual question was: "Why didn't you recommend to [Hatch] that he use your bookkeeping services, or somebody else's?" (4:118.) As already discussed (supra:33), there was no apparent relevance to this question, as the district court ruled (4:118-119). Moreover, even if Hatch had asked Wallis about her own bookkeeping expertise, that also would have been irrelevant because Hatch did not retain Wallis as a bookkeeper. It was Hatch who was the alleged "poor bookkeeper" (Br. 46), and it was he who was responsible for the accuracy of the information that he gave to Wallis, not the other way around.

Second question. The government has already addressed Hatch's claim that he was entitled to ask Wallis whether an S-corporation must "pay a reasonable salary to its employees." (Br. 46.)

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[12] The court made the same point and related points at a second pre-trial hearing (1/4/06 Hearing 38-42), and defense counsel made a similar concession (ibid. 28).

Third question. Hatch says (Br. 46-47) that the court erred in preventing his counsel from asking Wallis: "Would you agree with me that control over a person is one of the most important tests as to whether or not someone is an employee or an independent contractor?" (4:112-113.) Hatch never explained the point of this question and the court properly ruled that it was irrelevant. (4:113.) Moreover, his new proffer that Wallis's answer might have shown that "she did not understand the 2001 subchapter S application" (Br. 48) is doubtful at best and irrelevant if true. None of this could have had any bearing on Hatch's intent, as discussed above. (Supra:37-38.) In particular, it is unclear how Wallis's alleged lack of expertise on the employee/contractor distinction could have contributed to Hatch's decision to conceal $321,139 in Tri-Whale income from Wallis after she specifically told him that all Tri-Whale income needed to be reported. And if that were not enough, Wallis had already answered the same basic "control" question moments before. (4:111-112.)

Fourth question. Contrary to Hatch's assertions (Br. 47), the court did not preclude his counsel from asking Wallis if she knew why Tri-Whale had received a loan from a "shareholder." The court merely sustained an objection to the first question in this series, because the question was poorly worded and prefaced with the editorial "[i]t doesn't make any sense." (4:127.) Thereafter, counsel was allowed to ask further questions on this topic (4:127),

which was irrelevant in any event.

Finally, although Hatch now says that the four questions might have exposed bias (Br. 48), no such rationale was advanced below and his current bias theory is unclear.

6. Cross-examination of Plotkin

Plotkin was the first of two accountants who told Hatch that he was required to report the $1 million prize. Plotkin prepared a completed tax return for Hatch that reflected that income but omitted other income that Hatch had not revealed to him. Hatch chose not to file that return, and thereafter sought the services of Wallis. (Supra:5-6.)

Hatch says that on cross-examination, "[t]he thoroughness of Plotkin's interview with Hatch, a component of the defense, was cut off," citing Volume 3, page 136. (Br. 49.) That record cite discloses a single sustained objection to an argumentative and misleading question: "How do you explain that you're sent a client to deal with a million dollars and he set up a charitable foundation and you had no discussions with him on the charitable foundation whatsoever?" (3:136.) The thoroughness of Plotkin's discussions with Hatch was amply covered elsewhere during the cross-examination. (3:119-120,124-127,135-140.)

Hatch says that "Plotkin's statement that he had never talked to Rodrigues-Wallis, a statement that was highly suspect, could not be sufficiently tested," citing Volume 3, page 142. (Br. 49.) The

record reveals, however, that Plotkin admitted he had spoken about Hatch with a female accountant (clearly Wallis) but merely could not recall her name, and counsel was given plenty of room to probe on that detail. (3:140-144,147.) Hatch adds that "the two accountants failed to appropriately communicate with each other" (Br. 49) -- an assertion that is ironic given that it was Hatch who told Wallis not to contact Plotkin. (Supra:6-7.)

Contrary to Hatch's assertions (Br. 49), he was in fact permitted to ask Plotkin about the employee/contractor distinction with the exception of one question (3:119-122), and the entire area was irrelevant in any event.

Hatch's last example of what he calls "[t]he elimination of key cross-examination areas" (Br. 50) appears in the following assertion: "Plotkin's understanding of Hatch's knowledge of subchapter S corporations was judicially determined, not fair game, in cross-examination," citing Volume 3, page 124. The sole blocked question, however, was: "Would it be fair to say that Mr. Hatch didn't even know what a subchapter S corporation was before he got this advice from you and the others?" (3:124.) The district court accurately observed that the reason why it sustained the objection was "obvious." (3:124.)

7. Cross-examination of Agent Rameaka

The lead premise of this argument is that Agent Rameaka gave "extensive testimony" concerning various exhibits in "an effort to

show that the IRS' investigation of Hatch was thorough," to suggest that the exhibits were "hard to get," and to give the jury the "impression that Hatch was sneaky, that he hid information," whereas in fact all these exhibits "came from Hatch." (Br. 50-51.) With two exceptions, however, the relevant exhibits were publicly-filed documents, bank records, or summaries of bank records, and they were introduced to prove (1) Hatch's ownership of the Newport and Middletown properties, (2) his control over the account in which he deposited "charity" proceeds that he diverted to his own use (making them personal income), and (3) his receipt of unreported rental income. (5:5-14.)

The two limits on cross-examination were as follows. The court ruled the following question was irrelevant: "And you haven't told the jury that many records came as a result of Mr. Hatch obeying the law and handing them over to you; correct?" (5:15.) The court said that counsel could explain his position to the contrary at the morning recess. (5:16.) Thereafter, counsel was permitted to establish that Tri-Whale produced one of the exhibits pursuant to a subpoena. (5:19-20.) This led to the next question that the court ruled was irrelevant: "Is that always the case when you ask someone that's been accused of tax evasion, do they always obey the Subpoena and give you the documents?" (5:20.)

Hatch ignores the district court's comprehensive ruling at the morning recess, which was that: (1) the questions were plainly

irrelevant for several reasons; (2) counsel had been permitted to establish that Hatch (though Tri-Whale) produced some documents; and (3) the questions were improperly worded in that counsel had "interjected . . . a lot of editorial comment." (5:57-58.) The court was correct on all three fronts and Hatch makes no coherent argument to the contrary.

8. Any Error Was Harmless

There were no erroneous limitations placed on the cross-examination of the three witnesses, much less restrictions that rise to the level of an abuse of discretion or that implicate the constitution. At best, the issues Hatch wished to pursue were of marginal relevance. When the exclusions are weighed against the impregnable government case (supra:3-16,30), there can be no serious claim that they affected the result of the trial.

C. THERE WERE NO FLAWED RULINGS ON EXPERT WITNESS TESTIMONY

1. Introduction

Hatch argues that the district court erroneously admitted "expert" testimony of Plotkin, Wallis, Rameaka, and Agent Michael Pleshaw, and that it improperly excluded expert testimony offered by defense witness Daniel Urso. (Br. 52-65.) These claims ignore pertinent rulings, misrepresent the record, and fail to establish anything even remotely approaching an abuse of discretion or plain error, much less prejudicial error.

2. Plotkin Did Not Testify As An Expert

On the first cited transcript pages (Br. 56), Plotkin testified on direct examination without objection as a fact witness on the following issues: (1) the mechanics of how he prepared the tax return which included the *Survivor* income but omitted the other income (3:91-93); (2) the significance of various dollar amounts which appeared on the return (3:102,105); (3) what a W-2 is (3:102); (4) the fact that some handwriting on Exhibit 125 was Hatch's and some was his assistant's (3:105); (5) the fact that Hatch never questioned the inclusion of the *Survivor* prize in the return and indeed discussed the possibility of a compromise with the IRS (3:111); (6) what an offer and compromise is (3:111); (7) that he and Hatch signed the return but that Hatch declined an offer for the firm to mail the return for him (3:112); (8) that he discussed with Hatch the advantages of receiving his radio station income as an independent contractor as opposed to an employee, and what those benefits were (3:114,116); and (9) that Tri-Whale was an S-corporation, that he explained to Hatch what an S-corporation is, and that he told Hatch that all S-corporation income would have to be reported on his individual return (3:116-117).

On the next cited transcript pages (Br. 56), Plotkin testified on redirect, over a "leading" and "mischaracterization" objection, concerning the following issues that had been raised by the defense on cross-examination: (1) his credentials as an accountant

(3:145); (2) the significance of various items on the tax return he prepared for Hatch (3:145-147); and (3) his memory concerning a call from the female accountant (3:147).

None of this was expert testimony; still less was it obviously so for purposes of plain-error review. See United States v. Diaz, 300 F.3d 66, 74-76 (1st Cir. 2002). Moreover, there is no obvious reason why Plotkin was unqualified to give the testimony even if it is assumed to be expert (Hatch points to none), and there was (and is) no claim of unfair surprise. Finally, the assertions that the "chief real reason" for the testimony was to "persuade the jury of Plotkin's professional expertise" (Br. 56), and to demonize Hatch for being wealthy (Br. 56 n.47), are baseless.

3. Wallis Did Not Testify as an Expert

As proof that Wallis gave expert testimony, Hatch cites Volume 4, pages 153 and 155-156. (Br. 57.) This is Rameaka's testimony. (4:153,155-156.) Perhaps Hatch meant to refer to those pages in Volume 3, where Wallis testified without objection on the following issues: (1) that Hatch gave her a 1099 reflecting the *Survivor* income and what a 1099 is (3:153); and (2) that Hatch discussed with her his unsupported theory that perhaps CBS might have paid his taxes, that she told him this was improbable, that he never produced any evidence that CBS might have paid his taxes, and that she warned him that if CBS had done so this itself would be a taxable item (3:155-156).

On the next cited transcript pages (Br. 57), Wallis testified without objection concerning the mechanics of how she prepared the 2000 tax return (the one Hatch never filed), the significance of various dollar amounts on the return, and her interactions with Hatch during the process. (4:9-10.) The final cited transcript page (Br. 57), consists of questions asked by the defense on cross-examination concerning the Tri-Whale tax return. (4:124.)

Again, there was no plain or obvious expert testimony here, there was (and is) no claim of unfair surprise, and there was (and is) no attempt to claim that Wallis was unqualified in any event.

4. Agent Rameaka Did not Testify as an Expert

The single-sentence argument that Agent Rameaka testified as an expert rests solely on the assertion that he "obtained various documents about Hatch" and "created several summary charts" depicting the flow of money in Hatch's bank accounts and his receipt of rental income. (Br. 57.) The underlying assertion is true. (A:495-498; 4:156-161,173-176,182-184; 5:8-15.) The problem with the perfunctory claim is that Hatch never objected to this testimony on Rule 702 grounds, and it is plain that it was not expert testimony.[13]

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[13] The actual objection was that Rameaka should not be permitted to testify as a summary witness (4:144-147) -- an objection that is abandoned on appeal.

5. Agent Pleshaw's Testimony was Properly Admitted

It is unclear whether Hatch is making a free-standing argument that IRS Agent Pleshaw's testimony was inadmissible. (Br. 57-60.) It could be that this section of his brief is just a prelude to a later claim (Br. 60-65) addressed below. In any event, any such argument is meritless.

Hatch conceded that the key omitted income charged in the indictment should have been included in the tax returns and that this would be undisputed at trial. (12/21/05 Hearing 4-5.) In addition, Hatch acknowledged the odds were slim that a jury would find there was no "substantial" tax owed if those sums were included, and that consequently this would not be the focus of his defense. (12/21/05 Hearing 5-9.) Hatch was unwilling to stipulate to that point, however. (Ibid. 8-9.) Compare United States v. Mikutowicz, 365 F.3d 65, 70 (1st Cir. 2004) ("tax evasion requires government to prove that defendant owed substantially more federal income tax than declared"), with United States v. Lavoie, 433 F.3d 95, 98 (1st Cir. 2005) ("The amount of the understatement is certainly probative as to whether an understatement is a mistake or willful").

To establish that if the omitted sums were included there would have been a substantial tax owed, see, e.g., United States v. Sutherland, 929 F.2d 765, 779-80 (1st Cir. 1991), the government relied on Agent Pleshaw. While disputing that Pleshaw's proposed

testimony fell under Rule 702, the government promised at a pre-trial hearing to provide the defense with "a more detailed document" concerning Pleshaw's credentials. (12/21/05 Hearing 51-52.) The court noted that there was an open question concerning whether Pleshaw should be treated as an expert, but that the parties and the court had "clarified the scope" of his testimony earlier that morning. (Ibid. 51-52.)[14] Although the court signaled that the tax-owed testimony would likely be admitted whether or not it constituted expert testimony, it expressly invited counsel to file a motion for a Daubert hearing if he believed one was required after reviewing the promised government submission. (Ibid. at 52-53.) The court said it would hold such a hearing in early January if necessary. (Ibid. 53.) The government promptly provided the defense with the additional notice (3:181-182), but no such motion was filed. No hearing was requested.

As predicted, at trial, Agent Pleshaw went through each of the omitted sums and explained how much taxes Hatch would have owed if those sums had been included, using charts to illustrate his points. (5:75-109; Exhibits 313, 317, 318; A:499-500.) Before doing so, Pleshaw described his ample qualifications (5:75-78) -- now characterized by Hatch as a "significant expert background." (Br. 57 n.51.)

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[14] A transcript of an earlier hearing on this date exists, but it does not capture this discussion.

Large swaths of Pleshaw's testimony came in without any objection. (5:75-109.) Counsel did object that some questions were leading or unclear and that some answers were non-responsive or had already been given. (5:82,84,92-96,101.)

There were four Rule 702-related objections. In establishing Pleshaw's qualifications as a preliminary matter, the government asked him what an audit is, which led defense counsel to object on the basis that "[t]his witness has not given an expert report and has not been proven to be an expert in auditing." (5:77.) The court overruled the objection, noting that "he just asked what an audit is." (5:77.) Nine transcript pages elapsed before the next Rule 702-style objection, during testimony concerning "income limitations," at which time counsel asked for "a continuing objection to [Pleshaw's] testifying as an expert on tax law without having him been proven an expert." (5:86.) The court explained why it would not allow a continuing objection. (5:86.) Eleven transcript pages later, during testimony on itemized deductions, the court denied another request for a continuing objection for stated reasons, after which counsel said: "He's giving his expert opinion on the tax rules and ramifications, and he is not an expert and has not submitted an expert report to the Court." (5:98-99.)[15]

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[15] Counsel never said what he meant by "an expert report to the Court," and the record does not disclose the content of the government notices to the defense (at least four in number) outlining Pleshaw's expected testimony and credentials.

The court overruled the objection, noting counsel could cross-examine Pleshaw on that subject. (5:99.) The last such objection came two transcript pages later, during a question concerning the "rental income adjustment," when counsel objected that Pleshaw was not "qualified" and that the question was "leading." (5:101.) The court sustained the objection, apparently on the latter ground, and there was no further objection after the question was rephrased. (5:101-102.)

To the extent that Hatch challenges the admission of Pleshaw's testimony on appeal (Br. 57-60), review of the preserved objections is for an abuse of discretion, but the balance of the testimony is reviewed for plain error. Diaz, 300 F.3d at 74-76.

For three main reasons, Pleshaw's testimony was properly admitted even assuming that it fell within Rule 702 and regardless of the standard of review. Cf. United States v. Villarman-Ovideo, 325 F.3d 1, 12-13 (1st Cir. 2003) (avoiding question of whether court erred in treating testimony as lay rather than expert because testimony satisfied Rule 702 in any event given witnesses' obvious qualifications).

First, there was (and is) no developed argument that Pleshaw's testimony was based on unreliable principles, inadequate data, or a flawed methodology, and in rejecting an earlier challenge to testimony by Pleshaw this Court stated: "It is well established in several circuits that '[e]xpert testimony by an IRS agent which

expresses an opinion as to the proper tax consequences of a transaction is admissible evidence.'" Mikutowicz, 365 F.3d at 72. Second, there is no basis for claiming on this record (5:75-78) that Pleshaw was unqualified, and indeed Hatch all but concedes the point (Br. 57 n.51). See, e.g., United States v. West, 58 F.3d 133, 139-40 (5th Cir. 1995). And third, although Hatch claims that Pleshaw "was exempted from providing an expert report" (Br. 57), referring to his obscure trial objections (supra:49), it is unclear what he means by this and he cites no record support for the assertion. The bottom line is that the court invited Hatch to move for a Daubert hearing if he still had Rule 702 concerns after he received the government's additional notice regarding Pleshaw (supra:47-48), yet Hatch never pursued such a hearing and never even sought a sidebar at trial to develop a complaint based on lack of adequate notice. Because the pertinent government notices are not part of the record, the government would be hamstrung if Hatch were permitted to pursue his embryonic notice claim on appeal.[16]

Finally, although Hatch says that Pleshaw opined that he "lied about the $25,000 charity money" and called "the charity money stolen" (Br. 58), the cited record does not support that assertion.

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[16] Hatch suggests without citation that a court must formally designate a witness as an expert, but the law is otherwise. See 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6265 (2005); Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994); United States v. Bartley, 855 F.2d 547, 552 (8th Cir. 1988); Cummings v. Artuz, 237 F. Supp.2d 475, 487 (S.D.N.Y. 2002).

(5:84.) Pleshaw was merely referring to earlier trial evidence as context for his analysis, which is entirely appropriate. Mikutowicz, 365 F.3d at 72; United States v. Casas, 356 F.3d 104, 120 & n.4 (1st Cir. 2004); West, 58 F.3d at 140-41; Sutherland, 929 F.2d at 780.

In addition to the harmless error argument made below, there are three more specific reasons why Hatch suffered no prejudice here. First, Hatch all but conceded that if the omitted sums were included, he evaded paying a substantial amount of taxes. (A:61; 11/16/05 Hearing 15-16; 12/21/05 Hearing 4-9,40,47; 1:54-62,74-75; 4:119.) Second, the evidence on this point was irrefutable. And third, the retail nature of the defense response made it all but irrelevant because, at most, "the Government need prove only that the amount of tax evaded was substantial" and "[i]t is not necessary to prove the exact amount." United States v. Sorrentino, 726 F.2d 876, 880 n.1 (1st Cir. 1984); but cf. Lavoie, 433 F.3d at 98 (implying that "substantial" language found in the case law is not a separate element and that magnitude of omissions is merely relevant factor in assessing willfulness).

6. The Limits on Urso's Testimony Were Proper

After briefing and argument by the parties (A:47-63; 1/4/06 Hearing 2-32), the district court granted in part and denied in part the government's motion in limine to preclude Daniel Urso, a CPA, from testifying on certain topics (1/4/06 Hearing 32-42; A:65-

66). The court had earlier expressed skepticism concerning some of this evidence. (12/21/05 Hearing 36, 46-47.) Still, the court made clear that either side could request reconsideration at trial. (1/4/06 Hearing 42; A:65.)

Hatch now identifies four areas where he says his examination of Urso was unfairly restricted. (Br. 61-65.)

First area. The court properly sustained an objection to a confusing and compound question on the "appropriate" business relationship between a CPA and a "new client." (7:137.) Defense counsel later proffered that Urso would testify that "a normal business relationship with a CPA takes time to develop, that they to start [sic] look into these matters, and that there has been absolutely no due diligence with Mr. Plotkin at all, and that would give a normal taxpayer cause to be concerned about whether or not they had an accurate return." (7:147.) This vague proffer shed little light on how the initial question was relevant. It was for Hatch, not Urso, to explain why Hatch "had reason not to rely on Plotkin." (Br. 61.) Moreover, the proffer did not identify any specific instances of "gross incompetence" (Br. 61) by Plotkin or Wallis, much less explain how that alleged incompetence related to Hatch's intent.

Second area. Hatch tried to introduce testimony from Urso to the effect that the 1099 Hatch received reflecting the $1,010,000 (Exhibit 12), was incorrectly filled out by SEG because the $1

million and $10,000 should have been treated separately and certain numbers should have been shown in different boxes on the form. (7:140-142.) The court properly noted, however, that "[u]nless there is some evidence that because of the way this form was filled out, Mr. Hatch was misled into believing that this was not taxable income, this evidence would be totally irrelevant." (7:143.) When the court offered counsel another chance to make the link, his only response was that "it is relevant because it shows that SEG got it wrong, and it was an extremely complicated tax issue." (7:143.) But that was not a link at all, as the court found. (7:143.)

Third area. Hatch sought to ask Urso about the effect of the "alternative minimum tax" on the $200,000 in alleged commissions listed in the Exhibit 3 return, to suggest that he would not have received any tax advantage from the false statements had the return been filed. (7:148-151.) The court properly found that the issue was irrelevant (7:151), especially since there was no suggestion that Hatch was aware of the effect of the alternative minimum tax when he made the statements to Wallis. Moreover, the evidence would not have shown that Hatch "did not knowingly file a false return" (Br. 63) in the case of the hypothetical return that was filed -- a return that did not list the commissions since it did not even list the *Survivor* prize itself. (4:28-32; Exhibit 1.)

Fourth area. Hatch sought to establish through Urso that the tax returns prepared by Plotkin and Wallis were "abysmally poorly

prepared" and "incompetently prepared beyond imagination," and that Wallis had committed "ethics" violations. (7:143-148.) There are two problems. First, counsel never explained precisely what the alleged incompetence and ethical violations even were, and never adequately linked those issues to Hatch's intent. (Ibid.) Second, referring to its earlier rulings (supra:53-54), the court properly concluded that the proposed testimony was irrelevant to the issue of Hatch's intent. (7:145-148.) Among other things, the court noted that (1) Hatch's theory of relevance rested on a mischaracterization of the charge (7:148), and (2) Hatch was "not claiming that he didn't file any of [the returns that were never filed] because he thought there was some flaw in the return" and that "[o]n the contrary, the gist of [his] position is that he didn't understand enough about the tax laws to really know whether these returns were correct or not." (7:146.) As the court reasoned: "So, therefore, any evidence that Mr. Urso might present as to whether he agrees with every entry in the return or whether he would have prepared the returns differently, is irrelevant." (7:146.) Thus, even assuming that Lankford was correctly decided (Br. 65) and that the dissent in that case was wrong, Lankford differs from the present case because there the defendant at least proffered a specific link between the expert testimony and his intent. Lankford, 955 F.2d at 1550-52.

7. Any Error Was Harmless

As stated, the case against Hatch was overwhelming to say the least. (Supra:3-16,30.) Even assuming arguendo that there was an abuse of discretion in the admission or exclusion of the above evidence, it is inconceivable that any such error affected the outcome of the trial. The evidentiary issues discussed above amounted to peripheral attacks, many of them directed against returns that were never even filed. None of these issues had any significant bearing on whether Hatch acted willfully when he grossly underreported his income in two separate years and on three separate returns.

D. THE SENTENCING CLAIMS ARE WAIVED AND MERITLESS

Hatch makes a perfunctory challenge to the loss finding. (Br. 66.) The claim is waived. United States v. Barrow, 448 F.3d 37, 44 (1st Cir.), cert. denied, 127 S. Ct. 176 (2006). The claim is also meritless because that finding was based squarely on (1) Agent Pleshaw's testimony that Hatch evaded paying well over $400,000 in taxes (5:75-109; Exhibits 313, 317; A:499), and (2) a guideline provision which Hatch ignores, USSG § 2T1.1(c)(1), comment. (n. (A)). (Sen. Tr. 7-10, 29-39; PSR ¶ 11.) There was no error at all, see, e.g., United States v. Chavin, 316 F.3d 666, 676-80 (7th Cir. 2002), much less clear error, cf. United States v. Pizarro-Berrios, 448 F.3d 1, 10 (1st Cir. 2006).

Hatch attacks the obstruction of justice enhancement in two sentences, apparently on an acquitted-conduct theory. (Br. 67.) There are five separate responses. First, the claim is undeveloped and thus waived. Second, the record refutes Hatch's assertion that "[m]uch of this finding" (Br. 67) was based on his testimony concerning the charity diversions and the alteration of the $25,000 donation check. To the contrary, the court catalogued many other instances in which Hatch committed perjury, noting that the list was "a pretty long one," and it also detailed the false statements that Hatch made to the Probation Office concerning his assets. (Sen. Tr. 46-60.) Third, Hatch overlooks the fact that the charity income formed a partial basis for the tax counts. The fact that the jury acquitted on the fraud charges does not mean that it disregarded the charity income in convicting on the tax counts. United States v. Cianci, 378 F.3d 71, 90-93 (1st Cir. 2004). Fourth, and in any event, if acquitted conduct may be considered at sentencing, United States v. Gobbi, No. 06-1643, 2006 WL 3804388, at *9 (1st Cir. Dec. 28, 2006), it follows that false testimony concerning such conduct may trigger an obstruction of justice enhancement. Fifth, the acquitted-conduct theory was never squarely raised below (Sen. Tr. 43-46; Docket No. 59), and there can be no claim of "obvious" error or a miscarriage of justice under the circumstances. United States v. Donnelly, 370 F.3d 87, 91-92 (1st Cir. 2004).

Hatch makes no effort to argue that he meets the governing post-Booker standard for reversal. (Br. 66-67.) Any claim here is waived.

In any event, "a defendant who attempts to brand a within-the-range sentence as unreasonable must carry a heavy burden." United States v. Pelletier, 469 F.3d 194, 204 (1st Cir. 2006). The mere fact that other "prominent convicted citizens" (Br. 66) have received lesser sentences in tax cases does not furnish an adequate basis for comparison, even under the untenable assumption that relevant comparisons would be enough to satisfy that heavy burden. United States v. Saez, 444 F.3d 15, 17-19 (1st Cir.), cert. denied, 127 S. Ct. 224 (2006). At the very least, the court's ruling, in which it emphasized Hatch's perjury at trial, his false statements to the Probation Office, the "exceptional degree of calculation" that went into his crimes, and the absence of mitigating factors (Sen. Tr. 72-76), provided "a plausible explanation and a defensible overall result." United States v. Jimenez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc).

V. CONCLUSION

For the above reasons, this Court should affirm.

Respectfully submitted,

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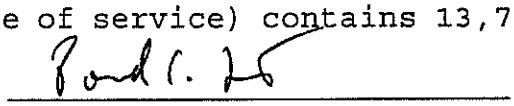
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Donald C. Lockhart, certify that the word processing system of the Office of the United States Attorney states that this document (excluding the table of contents, the table of authorities, the certificate of compliance, and the certificate of service) contains 13,713 words.



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CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of January, 2007, two copies of the within Appellee-United States' Brief were served, by Federal Express overnight delivery, on:

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